Nos. 87-1614, 87-1639, 87-1668

IN THE

Supreme Court Of The United States

October Term, 1988

JOHN W. MARTIN, *et al.*,
Petitioners,
v.
ROBERT K. WILKS, *et al.*,
Respondents.

THE PERSONNEL BOARD OF JEFFERSON COUNTY, ALABAMA, *et al.*,
Petitioners,
v.
ROBERT K. WILKS, *et al.*,
Respondents.

RICHARD ARRINGTON, JR., *et al.*,
Petitioners,
v.
ROBERT K. WILKS, *et al.*,
Respondents.

ON WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE PETITIONERS THE PERSONNEL BOARD OF JEFFERSON COUNTY, ALABAMA, *et al.*

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QUESTION PRESENTED FOR REVIEW

Whether persons affected by court-approved consent decrees containing race conscious relief can challenge those decrees in a collateral proceeding when they had notice and the opportunity to be heard before the entry of those decrees?

LIST OF PARTIES

Plaintiffs

James A. Bennett
Birmingham Association of City Employees
Charles E. Carlin
Ronnie J. Chambers
Floyd E. Click
Joel A. Day
Lane L. Denard
John E. Garvich, Jr.
James W. Henson
Gerald L. Johnson
Danny R. Laughlin
Robert B. Millsap
James D. Morgan
Gene E. Northington
Carlice E. Payne
Howard E. Pope
Vincent J. Vella
Phillip H. Whitley
Marshall G. Whitson
Robert K. Wilks
David H. Woodall

Plaintiff-Intervenor

United States of America

Defendants

Richard Arrington, Jr.
Roderick Beddow, Jr.
City of Birmingham
Joseph W. Curtin
James W. Fields
Patricia Hoban-Moore
James B. Johnson
Henry P. Johnston
Hiram Y. McKinney
The Personnel Board of Jefferson County, Alabama

Defendant-Intervenors

John W. Martin
Sam Coar
Major Florence
Charles Howard
Ida McGruder
Eugene Thomas

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported as *In re Birmingham Reverse Discrimination Employment Litigation,* 833 F.2d 1492 (11th Cir. 1987) (Pet. App. at 3a-24a).[1] The opinion of the United States District Court for the Northern District of Alabama is reported, in part, as *In re Birmingham Reverse Discrimination Employment Litigation,* 39 Fair Empl. Prac. Cas. (BNA) 1431 (N.D. Ala. Dec. 20, 1985) (Pet. App. at 27a-66a); additional findings by the district court are not reported but have been printed at pages 69a-76a of the Appendix to the Petitions for *Certiorari* and also appear at R9-1256, 57.

JURISDICTION

The opinion of the Court of Appeals for the Eleventh Circuit was entered on December 15, 1987 (Pet. App. at 3a). The court of appeals denied petitions for rehearing and suggestions for rehearing en banc in an order dated January 25, 1988 (Pet. App. at 25a). Timely Petitions for *Certiorari* were filed by (i) Defendant-intervenors John W. Martin, *et al.,* No. 87-1614 on March 30, 1988, (ii) Defendant The Personnel Board of Jefferson County, Alabama, *et al.,* No. 87-1639 on March 31, 1988, and (iii) Defendant Richard Arrington, Jr., *et al.,* No. 87-1668 on April 1, 1988. The Petitions were granted and the cases consolidated by order of this Court on June 20, 1988. This Court's jurisdiction is invoked under 28 U.S.C. §§ 1254(1) and 2101(c).

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[1]The Appendix to the Petitions for *Certiorari* is cited as "Pet. App."; the Joint Appendix is cited as "J.A."; exhibits to the 1985 trial are cited as "PX" (plaintiffs' exhibits) or "DX" (defendants' exhibits); and the record in the court of appeals is cited as "R [volume] - [document number] - [page]".

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth and Fourteenth Amendments to the Constitution of the United States and § 703(a) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a), which are set forth in pertinent part at pages 1a and 2a of the Appendix to the Petitions for *Certiorari.*

STATEMENT OF THE CASE

Since its creation in 1945, the Personnel Board of Jefferson County, Alabama (the "Board") has spent one-third of the length of its existence enmeshed in this litigation concerning its employment practices. To date, this litigation has included three trials, three appeals and two petitions for *certiorari* to this Court.

The events giving rise to this labyrinth of litigation can be traced back to 1974, when a series of lawsuits were commenced against the Board and the City of Birmingham (the "City"). In January, 1974, the Ensley Branch of the NAACP, together with other named individuals, and John W. Martin, with other named plaintiffs, commenced separate actions against the Board and the City alleging that the Board and the City were engaging in employment practices discriminatory against blacks. *In re Birmingham Reverse Discrimination Employment Litigation,* 833 F.2d 1492, 1494 (11th Cir. 1987); Pet. App. 3a-4a. Thereafter, in May, 1975, the United States brought a separate "pattern and practice" suit against, among others, the Board and the City, asserting broad charges of race and sex discrimination in employment. 833 F.2d at 1494; Pet. App. 4a.

After consolidating the actions for discovery and trial, the district court judge, the Honorable Sam C. Pointer, Jr., conducted a bench trial on the limited issue of the validity of entry level tests for police and firefighters. In an opinion dated January 10, 1977, the district court concluded that the Board's actions violated Title VII, finding that the tests used by the Board had an adverse impact upon black applicants. *Ensley Branch, NAACP v. Seibels,* 13 Empl. Prac. Dec. (CCH)

¶ 11,504 (N.D. Ala. Jan. 10, 1977); J.A. 553-93. On appeal to the former Fifth Circuit Court of Appeals, the district court's finding of discrimination against the Board was affirmed. *Ensley Branch of NAACP v. Seibels,* 616 F.2d 812 (5th Cir.), *cert. denied,* 449 U.S. 1061 (1980).

A second trial was held in August, 1979, during which the validity of certain other tests and screening devices employed by the Board were at issue. After that trial, but prior to a ruling, the Board, confronted with the distinct possibility of being found guilty of discriminatory practices for a second time,[2] entered into extensive negotiations with the plaintiffs which culminated in a settlement on terms embodied in proposed consent decrees intended both to resolve the issues submitted to the district court and to govern the future employment practices of the Board and City. In June, 1981, two proposed consent decrees — one for the Board (Pet. App. 202a-35a) and the other for the City (Pet. App. 122a-201a) — were provisionally approved by the district court, subject to objections of interested persons and a fairness hearing. J.A. 694-96.

The proposed Board Decree contained a carefully constructed affirmative action plan designed to effect the integration of blacks and women into the civil service system. The Board's proposed decree generally focused upon the Board's role as administrator of the Jefferson County, Alabama merit civil service system and specifically addressed the Board's responsibility in recruiting, screening, testing and certifying applicants for hire and promotion to those jurisdictions (including the City) governed by the civil service system. Since the Board has no participation in the actual selection of individuals for hire and promotion (Pet. App. 213a) and the City has no involvement in the certification of individuals to be selected, the proposed decrees were neces-

[2]In approving the decrees' corrective measures, the district court stated "it can hardly be doubted that there is more than ample reason for the Personnel Board and the City of Birmingham to be concerned that they would be in time held liable for discrimination against blacks at higher level positions in the police and fire departments and for discrimination against women at all levels in those departments." Pet. App. 244a.

sarily interwoven to accomplish the underlying purpose of the decrees — to settle contested litigation by correcting unlawful racial and gender imbalances in the City's employment force. Under its proposed decree, the Board was to act as a conduit to afford the City a reasonable opportunity to meet the goals of the City's proposed decree by certifying sufficient numbers of qualified blacks and women for hire and promotion. Pet. App. 213a-16a.

Prior to the fairness hearing on the proposed decrees, public notice was given to all interested parties of the hearing date and the time for filing objections. *See* Pet. App. 146a-47a, 171a-92a, 222a-23a; J.A. 697-98. Objections to the proposed decrees were filed by three groups. Two of the groups, including the Birmingham Firefighters Association ("BFA"), opposed the race-conscious relief embodied in the decrees. The other group argued that the decrees did not go far enough in alleviating past discrimination against minorities.[3]

At the fairness hearing itself, the BFA and one of its members were represented by Raymond Fitzpatrick, the attorney for the white males (plaintiffs and respondents here) who later elected to collaterally attack the consent decrees. During the fairness hearing, the district court heard objections by, among others, Mr. Fitzpatrick, that the proposed consent decrees would have an adverse impact upon nonminority employees. J.A. 727-50; Pet. App. 238a-40a. Despite being afforded the opportunity to do so, Mr. Fitzpatrick presented no evidence at the hearing to support the contention that the proposed decrees would facilitate unlawful reverse discrimination. J.A. 732-40. After hearing and considering the arguments and objections to the race-conscious relief contained in the proposed decrees, the district court approved the decrees as "not inequitable, unconstitutional, or otherwise against public policy." *See*

[3]The three groups were (i) The Birmingham Firefighters Association and Billy Gray, J.A. 701-13, J.A. 728, (ii) Johnny Morris, with other named individuals, J.A. 714-16, J.A. 728, and (iii) the Guardians Association, J.A. 728. Also, an objection by an individual (James Miller) was considered by the district court. J.A. 728-29, Pet. App. 238a.

United States v. Jefferson County, 28 Fair Empl. Prac. Cas. (BNA) 1834, 1839 (N.D. Ala. Aug. 18, 1981); Pet. App. 246a.

Rather than seeking joinder of his clients as parties prior to the fairness hearing, Mr. Fitzpatrick waited until after the conclusion of the fairness hearing to file a motion to intervene. J.A. 774-76. The motion was denied as untimely. Pet. App. 246a. Subsequently, the district court also denied requests for preliminary injunctive relief to enjoin the enforcement of the consent decrees. J.A. 49-86. On appeal, the district court's denial of intervention and preliminary injunctive relief was affirmed, *United States v. Jefferson County,* 720 F.2d 1511 (11th Cir. 1983); J.A. 149-61, and the plaintiffs did not seek *certiorari.* In affirming the district court's denial of intervention as untimely, the court of appeals found that the BFA members "knew at early stage in the proceedings that their rights could be adversely affected. . . ." 720 F.2d at 1516; J.A. 154.

As blacks were promoted under the guidelines of the consent decrees, a series of separate lawsuits were filed by nonminorities alleging that the actions taken by the Board and the City pursuant to their respective decrees constituted unlawful reverse discrimination. Pet. App. 110a-17a; J.A. 93-100; J.A. 130-34. Those lawsuits were consolidated by order of the district court. J.A. 207, 218-19. As required by the consent decrees (Pet. App. 125a, 205a), the plaintiffs in the earlier litigation leading to the entry of the consent decrees, John W. Martin, *et al.,* intervened as defendants in the reverse discrimination litigation. J.A. 46-47; J.A. 106-08; J.A. 169-71. Although also required to defend the consent decrees it had fought so hard to place in effect, the United States later chose instead to intervene and realign with the nonminority plaintiffs in challenging promotions of minorities made pursuant to the decrees. J.A. 263-64; J.A. 324-35.

Upon completion of discovery, a trial commenced on December 16, 1985, focusing exclusively upon promotions in the Birmingham Fire and Rescue Service and the City's Engineering Department. Mr. Fitzpatrick represented the plaintiffs at trial. Aside from minor references to the Board

Decree and the Board's practices and procedures in conjunction therewith, the trial centered upon the City's personnel selection criteria and, specifically, allegations that the City was promoting blacks over demonstrably more qualified whites. Pet. App. 27a-36a, 77a-109a; J.A. 356-533. At the conclusion of the plaintiffs' case, the district court granted the Board's motion to dismiss (J.A. 28, J.A. 402-03, R9-1257, R14-272) pursuant to Rule 41(b) of the Federal Rules of Civil Procedure, specifically finding that "the evidence presented by plaintiffs does not establish discrimination by the Board."[4] J.A. 402-03; R9-1257. After the conclusion of the trial, the district court entered rulings in favor of the remaining defendants. Pet. App. 27a-36a, 67a-68a, 77a-109a.

On appeal, the Board contended (1) that plaintiffs had not properly appealed dismissal of the Board; (2) that plaintiffs, though afforded every opportunity to do so, had presented no evidence of unlawful discrimination by the Board; and (3) that plaintiffs in any event were barred from collateral attacks on actions taken in compliance with the Board Decree. Inexplicably, the court of appeals ignored the first two arguments and, while cryptically referring to the Board merely as a "nominal party,"[5] proceeded to hold that plaintiffs, on remand, were entitled to collaterally attack actions taken pursuant to the Board Decree. *In re Birmingham Reverse Discrimination Employment Litigation,* 833 F.2d 1492, 1498-1500 (11th Cir. 1987); Pet. App. 12a-19a. The court of appeals completely overlooked the finding by the district court that (irrespective of plaintiffs' standing to collaterally attack the Board Decree) the evidence failed to show unlawful discrimination by the Board. Although agreeing that the plaintiffs were not strictly bound by the decrees, Judge

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[4]Months before the trial, the district court judge stated to Mr. Fitzpatrick that his clients appeared to be making no claims of unlawful discrimination against the Board. J.A. 242. Counsel for plaintiffs did not question the judge's observation at that or any later time and, as Judge Pointer found, failed to present evidence at trial of discrimination by the Board.

[5]*In re Birmingham Reverse Discrimination Employment Litigation,* 833 F.2d 1492, 1497 n.17 (11th Cir. 1987); Pet. App. 11a.

Anderson, in dissent, argued that plaintiffs, if successful, should be limited to prospective relief against the City. Pet. App. 21a-24a.

SUMMARY OF THE ARGUMENT

Plaintiffs, who had notice of the consent decrees and the opportunity to be heard before their entry, should not be allowed to attack the consent decrees in these collateral proceedings. Plaintiffs could have intervened as parties in the consent decree litigation in a timely manner. They failed to do so. Their failure to timely intervene bars them from now proceeding in these collateral actions.

Plaintiffs had ample notice of the proposed consent decrees. They were afforded the opportunity to be heard. The claims now the subject of these collateral lawsuits were actually presented by the BFA and were considered by the district court prior to final approval of the decrees. Plaintiffs were afforded due process and were treated fairly. They are not entitled to yet another opportunity to be heard.

Sound policy reasons support the Board's position. If collateral attacks are allowed, the usefulness of consent decrees in encouraging voluntary compliance with Title VII will be eroded. If the element of repose historically afforded by consent decrees is destroyed, the incentive of litigants and courts to approve them in the first instance will be removed, thereby frustrating the policy encouraging voluntary compliance. Further, collateral attacks conflict with settled principles of comity. They cause inconsistent results, attended by confusion and uncertainty among those subject to their terms. They undermine the authority of the court which approved the decree by encouraging persons disappointed with the relief granted to shop for a different, more favorable ruling in another forum. They waste judicial and litigant resources by causing unnecessary relitigation of matters already decided.

The court of appeals overlooked the district court's dismissal of plaintiffs' claims against the Board and its finding that plaintiffs had failed to establish unlawful discrimination by the Board. The adjudication of plaintiffs' alleged claims of

discrimination against the Board was independent of the district court's separate ruling barring collateral attacks on the decrees. Accordingly, the dismissal of plaintiffs' claims against the Board should have been affirmed, irrespective of the question of whether collateral attacks are permissible. The court of appeals thus erred in remanding the case for a trial of plaintiffs' claims against the Board. The district court tried those claims once, on the merits. Plaintiffs lost, and are not entitled to yet another trial.

ARGUMENT

THE PLAINTIFFS HAD NOTICE AND THE OPPORTUNITY TO BE HEARD BEFORE ENTRY OF THE CONSENT DECREES AND THUS SHOULD NOT BE PERMITTED TO COLLATERALLY ATTACK THE CONSENT DECREES

Plaintiffs should not be permitted to collaterally attack the consent decrees. There is nothing unfair or unlawful in precluding these plaintiffs from now seeking to undo the decrees and to hold the defendants liable for having complied with the decrees. Plaintiffs had (1) notice and (2) an opportunity to be heard prior to entry of the decrees.[6] That is all that fundamental fairness and due process require. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314-15 (1950). Plaintiffs could have intervened before the district court's fairness hearing but deliberately chose instead to launch a belated collateral attack. They were afforded every reasonable opportunity for their day in court and are not entitled to a second chance. Most Federal courts that have considered the issue have come to the same conclusion. *See Culbreath v. Dukakis*, 630 F.2d 15, 20-23 (1st Cir. 1980); *Marino v. Ortiz*, 806 F.2d 1144, 1146-47 (2d Cir. 1986), *aff'd*, 108 S.Ct. 586 (1988); *Goins v. Bethlehem Steel Corp.*, 657 F.2d 62, 64 (4th Cir. 1981), *cert. denied*, 455 U.S. 940 (1982); *Thaggard v. City of Jackson*, 687 F.2d 66, 68 (5th Cir. 1982);

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[6]The district court specifically found that the notice given comported with due process requirements. J.A. 248a.

cert. denied sub nom. Ashley v. City of Jackson, 464 U.S. 900 (1983); *Striff v. Mason,* 47 Fair Empl. Prac. Cas. (BNA) 79, 83 (6th Cir. June 16, 1988); *Stotts v. Memphis Fire Dep't,* 679 F.2d 541, 558 (6th Cir. 1982), *rev'd on other grounds sub nom. Firefighters Local No. 1784 v. Stotts,* 467 U.S. 561 (1984); *Dennison v. City of Los Angeles Dep't of Water & Power,* 658 F.2d 694, 696 (9th Cir. 1981).[7]

A. *Plaintiffs' Failure to Intervene in a Timely Manner Bars These Collateral Attacks*

It is well settled that persons who have notice of a lawsuit affecting their interests and elect to bypass a known opportunity to intervene may be barred from contesting the outcome in a collateral proceeding. *See, e.g., Penn-Central Merger and N&W Inclusion Cases,* 389 U.S. 486, 505-06 (1968). *See also National Wildlife Federation v. Gorsuch,* 744 F.2d 963, 968-71 (3d Cir. 1984); *Safir v. Dole,* 718 F.2d 475, 482-83 (D.C. Cir. 1983), *cert. denied,* 467 U.S. 1206 (1984); *Bergh v. State of Washington,* 535 F.2d 505, 506 (9th Cir. 1976), *cert. denied,* 429 U.S. 921 (1976).

The rule squarely applies here. At the time the consent decrees were signed, the litigation had been pending for seven years, with all the widespread publicity normally attendant to cases of such import and magnitude. Plaintiffs, most of whom were BFA members and all of whom were city employees, had notice of (1) the proposed entry of the consent decrees, (2) their right to object to entry of the decrees and (3) their opportunity to be heard at the fairness hearing. Pet. App. 146a-47a, 171a-92a, 222a-23a; J.A. 697-98. BFA members knew of the litigation long before the fairness hearing and recognized at an early stage that their rights could be adversely affected by the proposed decrees. J.A. 154-55. The same interests which form the basis of plaintiffs' collateral attack not only were voiced by the BFA and Mr. Fitzpatrick at the fairness hearing (J.A. 732-40) but

[7]Other than the Eleventh Circuit in this case, only one court of appeals — the Seventh Circuit — has allowed collateral attacks. *See Dunn v. Carey,* 808 F.2d 555 (7th Cir. 1986).

were expressly considered by the trial judge prior to entry of the decrees. Pet. App. 236a-46a. The district judge did not simply "rubber stamp" the decrees, but approved them only after carefully weighing the concerns now espoused by plaintiffs and specifically finding that the decrees provided "appropriate corrective measures reasonably commensurate with the nature and extent of the indicated discrimination." Pet. App. 244a.

It was only after the fairness hearing, however, that the BFA and two of its members sought to intervene for the first time. J.A. 774-76. Their motion, for sound reasons similar to those which operate to preclude collateral attacks, was properly denied as untimely. Pet. App. 246a.[8] Plaintiffs, as individuals, never attempted to intervene, instead relying upon the BFA and Mr. Fitzpatrick to serve as advocates of their interests. Now, years later, they persist in asserting that their objections, once considered, should be heard again in a collateral proceeding. They are wrong, as a matter of policy and basic fairness. It is, at bottom, plainly inequitable for persons with adequate notice and opportunity to be heard to languish on the periphery of litigation, waiting to contest the outcome only after the legitimate rights of others have crystallized after years of contested litigation. This Court and others have not hesitated, in analogous contexts, to reach the same conclusion. *See, e.g., Penn-Central,* 389 U.S. at 505-06 (failure to intervene may preclude later collateral attack); *National Wildlife Federation,* 744 F.2d at 969-71 (plaintiffs who failed to timely intervene were barred from a later collateral

[8]The timeliness of a motion to intervene is left to the sound discretion of the court, considering all relevant circumstances, including possible prejudice to the putative intervenor and the parties. *NAACP v. New York,* 413 U.S. 345, 366 (1973). A motion to intervene to challenge a consent decree made after the fairness hearing normally should be denied. *See Reeves v. Wilkes,* 745 F.2d 965 (11th Cir. 1985).

The court of appeals affirmed the district court's finding of untimeliness. *United States v. Jefferson County,* 720 F.2d 1511 (11th Cir. 1983). Its analysis for affirmance, while largely correct, was flawed insofar as it was intended to proceed upon the assumption that the BFA members should be allowed to attack the decrees in collateral proceedings. *Id.* at 1518. J.A. 158-159.

attack); *Safir,* 718 F.2d at 482-83 (nonparties who failed to intervene are collaterally estopped from relitigating a decided issue); *Society Hill Civic Ass'n v. Harris,* 632 F.2d 1045, 1052 (3d Cir. 1980) (failure to take advantage of right to intervene may serve to bar a collateral attack); *Adams v. Morton,* 581 F.2d 1314, 1318 (9th Cir. 1978), *cert. denied sub nom. Gros Ventre Tribe of Fort Belknap Indian Reservation, Montana v. United States,* 440 U.S. 958 (1979) (party who fails to intervene is bound by the result); *Bergh,* 535 F.2d at 507 (9th Cir. 1976) (white fisherman barred from collaterally attacking order in favor of Indian fisherman; should have sought intervention in earlier action).

Additionally, plaintiffs, to the extent, if any, that they may claim to align themselves with the BFA's participation in the consent decree litigation,[9] are in no position to assert that the denial of the BFA's motion to intervene provides an excuse for now proceeding in these collateral actions. The BFA has no one to blame but itself for waiting too late to seek intervention.[10] The same can be said of plaintiffs, who, despite notice and opportunity, failed to take available steps to assure that they, as individuals, or the BFA, as their representative, timely intervened. Plaintiffs could have been made parties, but for their own handling of the matter.

Most importantly, however, whether due process was

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[9]Plaintiffs apparently deny that they are in privity with the BFA or other nonminorities who asserted objections prior to entry of the decrees. It is clear, however, that the BFA purported to present its objections and appeared at the fairness hearing on behalf of its members and other nonminority employees of the City. J.A. 703. At the fairness hearing, the BFA and one of its members were represented by plaintiffs' present counsel. J.A. 730. The BFA stated in its objections that "[i]t is duly authorized to represent the views of the majority of city firefighters" (J.A. 701) and requested the district court to consider the interests of nonminority city employees (*See* J.A. 703). The objections voiced at the fairness hearing were the same which form the basis of this collateral attack. Pet. App. J.A. 727-50, 701-16; Pet. App. 236a-46a. In his dissent below, Judge Anderson concluded that the BFA probably is in privity with the plaintiffs here. Pet. App. 21.

[10]As the Eleventh Circuit observed in affirming the district court's denial of intervention, "BFA members, having made an apparently ill-advised decision to rely on others to advance their interests, knowing that they could be adversely affected, cannot now be heard to complain." J.A. 155.

satisfied is not determined by whether plaintiffs were actually made parties to the consent decree litigation. The controlling question is whether they were afforded the *opportunity* to be heard, and, if they desired, to intervene. *See, e.g., National Wildlife Federation,* 744 F.2d at 969 (3d Cir. 1984). The evidence is clear and compelling that plaintiffs, consistent with the requirements of due process, were afforded that opportunity.

B. *Allowing a Collateral Attack on the Consent Decrees in These Cases Would Discourage Voluntary Compliance with Title VII.*

Voluntary settlement of employment discrimination disputes is the preferred means of achieving compliance with the anti-discrimination provisions of Title VII. *Alexander v. Gardner-Denver Co.,* 415 U.S. 36, 44 (1974). If non-parties like the plaintiffs here are allowed to attack a consent decree outside the confines of the action in which the decree was entered, there will be little or no incentive for an employer to negotiate a settlement of alleged violations of Title VII. Instead of serving as instruments of repose, consent decrees will be transformed into easily identifiable targets of attack in potentially unending litigation. Each employment decision made pursuant to a decree could expose the employer to a separate claim challenging the decree. In turn, the well-established Congressional policy of encouraging voluntary, rather than litigated, resolutions of employment discrimination cases will be drastically eroded. *See Local No. 93, Intern. Ass'n of Firefighters v. City of Cleveland,* 478 U.S. 501, ___, 106 S.Ct. 3063, 3072 (1986); *cf. United Steelworkers v. Weber,* 443 U.S. 193, 210 (1979) (Blackmun, J., concurring) (requiring employers to make findings of their own past discrimination in order to justify affirmative action plan would place voluntary compliance in "profound jeopardy").

Clearly, a public employer has little incentive to invest its already overburdened resources in an attempt to settle such claims under the continuing supervision of the court if there is no guarantee that the negotiated decree will have a binding effect on those who had notice and the opportunity to be

heard. *See* Note, *The Consent Judgment As An Instrument of Compromise and Settlement*, 72 Harv. L. Rev. 1314, 1316-17 (1959) (giving consent decree no more effect than that accorded a contract would remove settlement incentive). Removing the element of finality of consent decrees clearly frustrates the policy of encouraging settlement of Title VII disputes. *See Thaggard*, 687 F.2d at 69.

For reasons of public policy as well as those deriving from legal precedent, the Federal courts should encourage, not inhibit, the implementation of consent decrees as a means of voluntary compliance. Logic indicates that there is less antipathy on the part of employers and the public in complying with a voluntarily negotiated, though judicially sanctioned, consent decree, than there would be in adhering to a court-ordered remedial action after trial. A voluntary plan likely will engender less resistance and ill-will on the part of the affected employers and employees than would the same remedial action made the subject of a non-consensual edict by a court. *See* Resnik, *Judging Consent*, 1987 Legal Forum 43, 70; Schwarzschild, *Public Law by Private Bargain: Title VII Consent Decrees and the Fairness of Negotiated Institutional Reform*, 1984 Duke L.J. 887, 899. Thus, voluntary consent decrees, when measured against coercive means of assuring compliance with Title VII, are especially important and effective tools in remedying the effects of unlawful discrimination. The result urged by plaintiffs, however, would destroy the unique benefits of consent decrees by stripping away the practical incentives of litigants and judges to agree to and approve them in the first place.

C. *Well Settled Principles of Comity Are Violated when Collateral Attacks Are Permitted.*

1. *Collateral Attacks Cause Inconsistent Results.*

A decision from this Court prohibiting collateral attacks on the Board and City decrees will reinforce the right of litigants and the public to reasonably rely upon judicial action "by minimizing the possibility of inconsistent decisions." *Montana v. United States*, 440 U.S. 147, 153-54 (1979).

Conversely, if it is made possible for the nonminority employees here to belatedly challenge the decrees and obtain relief for alleged discrimination against them, both the Board and the City would be subject to potentially conflicting obligations. On the one hand, the Board and the City would be bound by their decrees; on the other, one or both of them might later be precluded from engaging in conduct which they had every reason to believe would be sanctioned and protected from attack by the requirements of the decrees, as approved by the court. The anomaly in such a result is made particularly apparent by the fact that conduct not in compliance with a consent decree is punishable by contempt.[11] *Local 93*, 106 S.Ct. at 3074 n.13. *See also United States ex rel Shell Oil Co. v. Barco Corp.*, 430 F.2d 998, 999 (8th Cir. 1970). If plaintiffs are permitted to have their way, defendants could be held liable for doing what their decrees, on pain of contempt, required them to do.[12] Plainly stated, that would be "unconscionable". *See Farmers Educational & Coop. Union v. WDAY, Inc.*, 360 U.S. 525, 531 (1959) (it would "unconscionable" to hold broadcaster liable for complying with statutory "equal time" provisions).

2. *Collateral Attacks Undermine the Authority of the Court which Approved the Consent Decree.*

A consent decree is not merely a contract between the litigating parties. It has, as a fundamental attribute, the cloak of judicial approval. *Local 93*, 106 S.Ct. at 3077. *See United States v. Swift & Co.*, 286 U.S. 106, 115 (1932). Limiting the opportunity to attack decrees like those at issue here will promote the desired goals of "establishing certainty and respect for court judgments" and "making efficient use of

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[11]This attribute of a consent decree, among others, distinguishes it from a mere voluntary affirmative action plan. The court of appeals, however, ignored that and other obvious distinctions, holding that there is no reason to treat a consent decree any differently than an affirmative action plan which has not been judicially approved. Pet. App. 19a.

[12]Plaintiffs' prayers for relief included a request to enjoin the defendants from complying with the decrees. Pet. App. 115a; J.A. 98-99, J.A. 133.

judicial energy devoted to individual cases. . . ." *I.A.M. Nat. Pension Fund v. Industrial Gear Mfg. Co.*, 723 F.2d 944, 947 (D.C. Cir. 1983).

Collateral attacks of the sort which plaintiffs now seek to mount conflict with the respect which Federal district courts owe to each other. If such attacks are permitted, persons disappointed with the ruling of one district court will be free to shop elsewhere for a more favorable decision, proceeding on nothing more than the notion that the first ruling somehow was wrong. In the process, one court will be pitted against the other, resulting in unseemly and unnecessary conflict.[13] The uncertainty engendered by such conflict would erode the integrity of the judicial process, both as a matter of fact and of perception among litigants and the public. Basic tenets of comity, as well as the orderly maintenance of judicial administration, strongly militate against such results. *See, e.g., Deposit Bank v. Frankfort*, 191 U.S. 499, 510-15 (1903); *Delaware Valley Citizens' Council for Clear Air v. Pennsylvania*, 755 F.2d 38, 43-44 (3d Cir.), *cert. denied*, 474 U.S. 819 (1985).

3. *Collateral Attacks Result in Undue Relitigation.*

If granted, the relief requested by plaintiffs likely will have far-reaching effects in spawning duplicative litigation, not just in Birmingham but throughout the country. Numerous municipalities now operate under the terms of Title VII consent decrees. *See, e.g., Stotts*, 467 U.S. 561; *Thaggard*, 687 F.2d 66. If the Birmingham decrees are exposed to attack, the door will be opened for massive relitigation on a nationwide scale. Issues actually decided will be opened to reexamination, over and over again. The strain on judicial resources as well as the financial resources of litigants,

[13]Usually the collateral action will be before a different judge, which often will be just what the plaintiff had in mind. By sheer coincidence, however, the first three of the collateral proceedings filed by the reverse discrimination plaintiffs were randomly assigned to Judge Pointer. J.A. 207. Two other actions, assigned to another judge in the district, were later consolidated before Judge Pointer (J.A. 207, 218), over the objection of counsel for plaintiffs. J.A. 196-201, 208-17.

already substantial in this protracted litigation alone, could and probably will increase many fold.

This case would be an especially inappropriate starting point for so broadly expanding the burden of the Federal courts and the litigants who appear before them. The underlying consent decree litigation was long and agonizing. It focused upon a notorious chapter in Birmingham's history, characterized by systematic discrimination against blacks. The enormity of that litigation is reflected not only by time and money expended but by the magnitude of the unlawfulness which the decrees served to remedy. The decrees were entered into in complete good faith, and had the positive, cathartic effect of righting a long history of public wrongdoing. Now, the courts are being asked to revisit the issue by persons who had the opportunity to be heard in the first instance. If that is allowed, the effects will be measured not just by the depletion of tangible judicial resources. Old animosities, long thought to have been laid to rest, will surface again. These plaintiffs have no right to exact such a heavy and unnecessary toll, simply because they wish to have their objections heard and considered yet again.

D. *Plaintiffs' Discrimination Claims Against the Board Have Already Been Adjudicated in Favor of the Board.*

The court of appeals directed the district court, on remand, to try the plaintiffs' discrimination claims against the defendants. Pet. App. 17a. Apparently preoccupied with the issue of collateral attack, the court of appeals overlooked the fact that plaintiffs' claims of discrimination against the Board were adjudicated at trial and decided against plaintiffs. Specifically, at the close of plaintiffs' evidence, the Board moved for dismissal of plaintiffs' claims pursuant to Federal Rule of Civil Procedure 41(b). Judge Pointer, in open court, granted the motion, specifically finding that "the evidence presented by plaintiffs *does not establish discrimination by the Board*". R9-1257 (emphasis added). *Counsel for plaintiffs pre-*

sented no argument in opposition to the motion.[14] No complaint or objection was registered by plaintiffs that the district court had failed to afford them an adequate opportunity to present claims of discrimination against the Board. Nothing in the record below suggests that plaintiffs were foreclosed from presenting such evidence.

Remarkably, the court of appeals failed to acknowledge any of these facts. Instead, while observing in a footnote that the Board was only a "nominal" party on appeal, it proceeded to remand for trial plaintiffs' claims, including those claims attacking the Board decree. In so doing, the panel below ignored the fact that plaintiffs' claims against the Board were heard and decided, *on the merits*. The district court's finding on the claims of discrimination was made before its final order barring collateral attack on the City's decree (Pet. App. 27a) and constituted a separate, independent ground upon which the court of appeals should have affirmed dismissal of the Board. Although they were not entitled to it, plaintiffs have had their collateral attack. They lost, and have no right to be heard again.

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[14]Throughout the trial proceedings, plaintiffs exhibited little or no real interest in pressing claims of alleged discrimination against the Board. As an example, in May 1984 the district court opined, in open court and in the presence of counsel for plaintiffs, that it did not appear that plaintiffs had asserted valid claims of discrimination against the Board. J.A. 241-42. Rather than dispute the court's observation, counsel for plaintiffs merely responded that the Board should remain a party for purposes of any later appeal. J.A. 242.

Plaintiffs' lack of zeal in pursuing claims against the Board is easily understood when viewed in the context of the Board's limited role in the matters in dispute. Pursuant to its enabling legislating (J.A. 429-435) and the consent decrees, the Board merely tests and certifies applicants for hire and promotion. The actual decision to hire or pomote is left to the City and the other jurisdictions served by the Board. Pet. App. 213a. In certifying qualified blacks pursuant to its decree (Pet. App. 213a), the Board does not displace qualified whites. The certification process does not discriminate against nonminorities and no claim has been made that the testing procedures used by the Board adversely affect whites.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the decision of the court of appeals be reversed and that the case be remanded with instructions to enter judgment for the Board.

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Respectfully submitted,

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